In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 962

JACOB M. POSS, PETITIONER

v.

JEROME LIEBERMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (Pet. 19–25) is reported at 187 F. Supp. 841. The opinion of the court of appeals (Pet. 26–31) is reported at 299 F. 2d 358.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1962. The petition for a writ of certiorari was filed on May 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the suit was properly removed to the United States District Court pursuant to 28 U.S.C. 1442(a).

2. Whether respondent's statement in an intra-agency report prepared in discharge of his official duties was absolutely privileged.

STATUTE INVOLVED

United States Code, Title 28, Section 1442:

> *Federal officers sued or prosecuted.*
>
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *.

STATEMENT

This is an action for libel against a claims representative of the Department of Health, Education, and Welfare predicated upon an allegedly defamatory statement made by the officer in a report prepared solely for the internal use of the agency by which he was employed. The pertinent facts may be summarized as follows:

Petitioner's wife filed a claim for social security benefits based upon her employment with two family-owned corporations of which petitioner was a shareholder and officer (Pet. 19, 26). Her claim was disputed by the agency on the ground that her salary did

not represent work actually performed, but was padded for the purpose of increasing potential social security benefits (Pet. 19).[1]

In December of 1957, petitioner, a lawyer, appeared before respondent, a claims representative of the Department of Health, Education, and Welfare, in connection with his wife's claim (Pet. 19). At this interview, respondent requested petitioner to produce the records and books of the two corporations which employed the claimant and of which petitioner was an owner and officer. Petitioner refused (*ibid*). Respondent prepared a report of the interview, and in it made the allegedly defamatory statement that the petitioner had told him on a prior occasion that he, the petitioner, had once been disbarred. In fact, petitioner had never been disbarred.

After the claim made by petitioner's wife was initially disallowed by the agency, petitioner took an administrative appeal (Pet. 19). In preparing for the hearing, petitioner inspected that part of the claimant's file that was open to him, and he discovered and had reproduced the disputed report (*ibid*). He thereafter brought this action for libel in the Supreme Court of the State of New York. On petition of the respondent, the action was removed to the District Court for the Eastern District of New York pursuant to 28 U.S.C. 1442 (Pet. 19).

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[1] The Secretary of Health, Education, and Welfare ultimately determined that the employment alleged in support of the claim was not bona fide. This ruling was sustained in *Poss v. Flemming*, 187 F. Supp. 821 (E.D. N.Y.), affirmed, 289 F. 2d 10 (C.A. 2), rehearing denied, 289 F. 2d 11, certiorari denied, 368 U.S. 902, rehearing denied, 368 U.S. 963.

Petitioner filed a motion in the district court to remand the suit to the New York state courts, contending that an action cannot be removed under 28 U.S.C. 1442 unless it appears on the face of the complaint that a federal question is involved and that his complaint had been drafted so that it did not appear that respondent was being sued for a statement made by him while acting under color of his office. Respondent moved for summary judgment on the ground that he was immune from civil liability since the intra-agency report prepared by him in the course of his official responsibility was absolutely privileged.

The district court denied petitioner's motion for a remand and granted respondent's motion for summary judgment. The court held that, unlike a removal under 28 U.S.C. 1441, the jurisdictional facts justifying a removal need not appear on the face of the complaint where removal is sought under 28 U.S.C. 1442. It further held that the allegedly defamatory statement was absolutely privileged because it was made in an intra-agency report in discharge of respondent's official responsibilities. The court found that it was respondent's duty as a claims representative to make a written report of all interviews, and to include in the report an evaluation of the credibility of the person whom he was interviewing (Pet. 23–24). It rejected petitioner's contention that statements concerning his credibility were not within the scope of respondent's duties, finding that petitioner was appearing before the respondent not only as a husband and legal representative, but also as the "principal stockholder and officer of a corporation that employed

the claimant, and the nature of the employment relationship was directly in issue before the agency" (Pet. 24).

The court of appeals affirmed. Noting that one purpose for the rule of official immunity from civil actions is to insure the "proper functioning of free communication within the government agency" (Pet. 28), the court held that statements made by federal officials are absolutely privileged where, as here, they are made in intra-agency reports required to be held confidential (Pet. 30–31):

> The defamatory statement here, in a report for internal agency use, properly concerned with the credibility of the appellant in the role of representative and witness as employer-husband of a claimant before the agency, clearly falls within the category of "internal libel" rather than public dissemination or press release. Even if information so transmitted were damaging to plaintiff, it would appear quite unlikely that there would be any dissemination of the information beyond the Agency. There seems little disagreement that in the situation posed in the case presently before us the need for freedom of communication within the agency overbalances the somewhat remote and limited probability of damage to the person libeled; and that here the defendant should be cloaked with the immunity of absolute privilege

ARGUMENT

The decision below is plainly correct and there is no occasion for further review by this Court.

1. The removal question raised by petitioner does not warrant this Court's consideration. It is clear

that respondent was either an "officer of the United States" or a "person acting under him" within the plain meaning of 28 U.S.C. 1442(a) and that the suit was for an "act under color of such office." The history of this provision shows no intent to limit its force to high-level executive officials. See Hart and Wechsler, *The Federal Courts and the Federal System*, 1147–1149. It is equally clear that the removal statute embodies no such self-defeating requirement as a limitation of removal to those cases in which the plaintiff either carelessly or generously alleges in the complaint the full basis of a federal defense. *Id* at 763, n. 1; *Gay* v. *Ruff*, 292 U.S. 25, 33–34. The courts below were therefore correct in holding that this suit was properly removed to the federal court.

2. There is also no need for further review of the determination that respondent is immune from civil liability under the rules enunciated in *Barr* v. *Matteo*, 360 U.S. 564, and *Howard* v. *Lyons*, 360 U.S. 593. It is clear that respondent, in making the allegedly libelous statement, was performing duties committed to his control and responsibility as a claims investigator. The petitioner appeared before the respondent not only as the claimant's legal representative, but also as the employer of the claimant whose claim was disputed by the agency. It was the duty of the respondent to prepare a report of his interview with petitioner and to include in it an evaluation of his credibility. Respondent's report was therefore absolutely privileged within the holding of *Barr* v. *Matteo*, *supra*.

Petitioner contends that respondent should not be afforded official immunity because he was not a high

ranking official. It is not, however, "the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas*, [161 U.S. 483], at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." *Barr* v. *Matteo*, 360 U.S. 564, at 573–574. Under this test respondent's report is so closely related to his duty of evaluating and reporting on the credibility of persons he has interviewed that it must be granted an absolute privilege.

Moreover, the statement complained of was contained in an internal agency report which, by statute, could not be made public. 42 U.S.C. 1306.[2] The courts have long recognized that statements made in internal reports of this kind are absolutely privileged because of the "need for a free flow of information within every executive department." *Barr* v. *Matteo*,

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[2] "No disclosure * * * of any file, record, report, or other paper, or any information, obtained at any time by the Secretary or by any officer or employee of the Department of Health, Education, and Welfare in the course of discharging the duties of the Secretary under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Secretary or from any officer or employee of the Department, shall be made except as the Secretary may by regulations prescribe. Any person who shall violate any provision of this section shall be deemed guilty of a misdemeanor * * *."

The regulations promulgated by the Secretary provide for disclosure of information contained in the files to the claimant or his legal representative, and to the public when authorized

supra, at 582 (dissenting opinion). See, also, *Lyons* v. *Howard*, 250 F. 2d 912 (C.A. 1), reversed on other grounds, 360 U.S. 593; *Preble* v. *Johnson*, 275 F. 2d 275 (C.A. 10); *United States* v. *Brunswick*, 69 F. 2d 383 (C.A. D.C.); *Farr* v. *Valentine*, 38 App. D.C. 413; *DeArnaud* v. *Ainsworth*, 24 App. D.C. 167. As the court below stated (Pet. 31):

> There seems little disagreement that in the situation posed in the case presently before us the need for freedom of communication within the agency overbalances the somewhat remote and limited probability of damage to the person libeled; * * *.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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by the claimant and "when consistent with the proper and efficient administration of the act." 20 C.F.R. 401.3(a). Also, disclosure may be made to the employer of the social security account number of the claimant and of a copy of a coverage or wage determination relating to the individual. 20 C.F.R. 401.3(c). The regulations also provide for disclosure of specified information to federal and state government officials for specified purposes.